

**JEC 16 1989**

JOSEPH F. SPANIOL, JR.  
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In The  
**Supreme Court of the United States**  
October Term, 1989

FREDERICK SMITH, in his individual and official  
capacity as Principal of the Bradford Area High School;  
RICHARD MILLER, in his individual and official capacity  
as assistant principal of the Bradford High School; and  
FREDERICK SHUEY, in his individual and official  
capacity as Superintendent of the  
Bradford Area School District,

*Petitioners,*

vs.

KATHLEEN STONEKING,

*Respondent.*

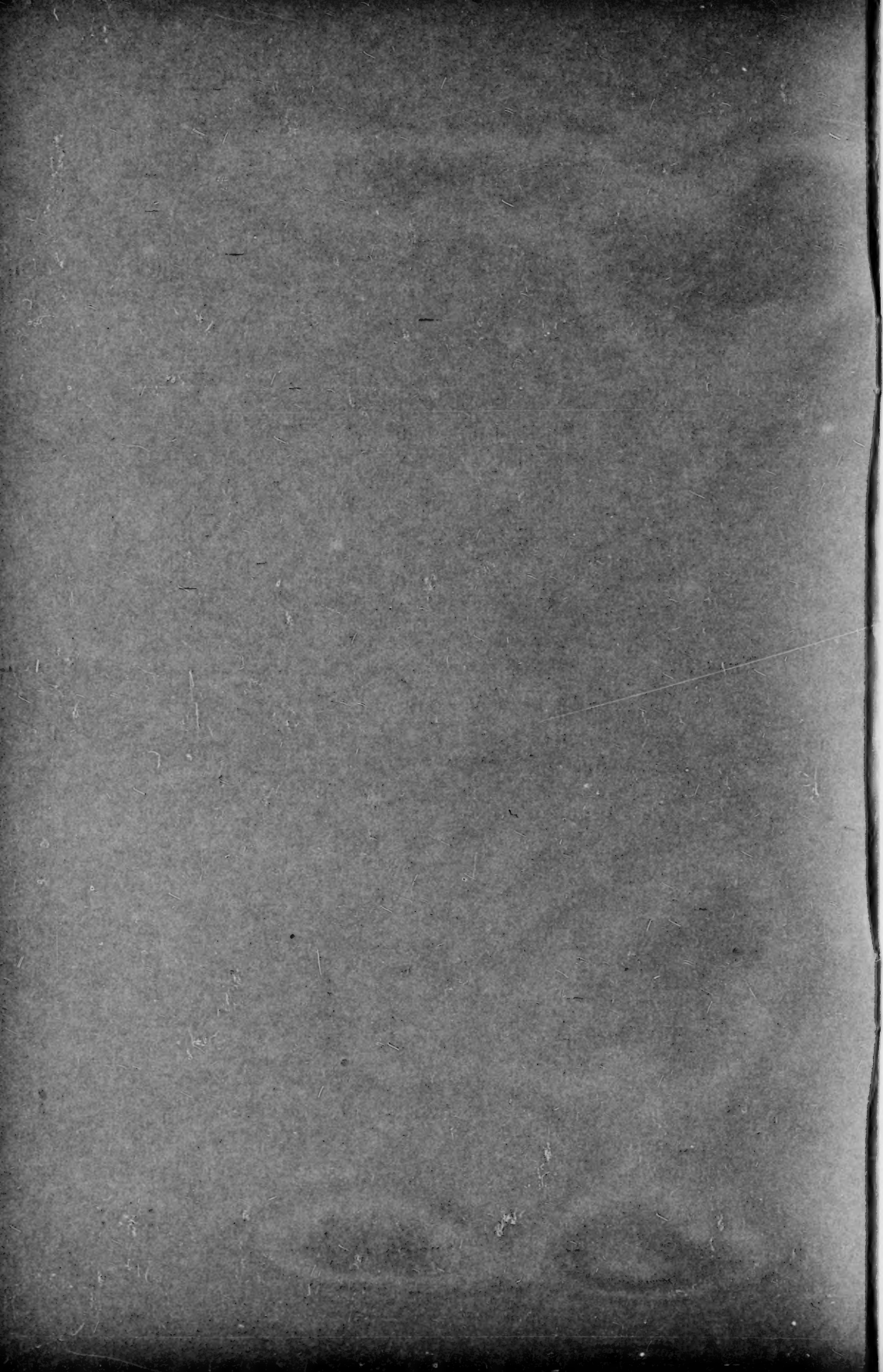
On Petition for Writ of Certiorari to the United  
States Court of Appeals for the Third Circuit

**RESPONDENT'S BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Whether public school administrators who adopt a practice, custom or policy of active concealment, toleration and facilitation of instances of known or suspected sexual abuse of students by their teachers are entitled to qualified immunity where their conduct results in repeated sexual assaults of students by teachers.
2. Whether the constitutionally protected liberty interest of individuals in freedom from physical abuse and the corresponding duty of government officials not to sanction, encourage or facilitate violations of that interest by their subordinates were clearly established between 1979 and 1983.

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## STATEMENT OF THE CASE

### a. Procedural Posture

Kathleen Stoneking ("Respondent" or "Stoneking") commenced this action pursuant to 42 U.S.C. Section 1983 (1982) in the United States District Court for the Western District of Pennsylvania, Case No. 87-63E, against the Bradford Area School District ("School District"), Frederick Smith, the principal of the Bradford Area High School, Richard Miller, the assistant principal, and Frederick Shuey, the superintendent of the Bradford Area School District.<sup>1</sup>

After some discovery, the defendants moved for summary judgment on various grounds, including that the individual defendants ("Petitioners") were shielded from liability under the doctrine of qualified immunity. The district court denied defendants' motion in its entirety. *Stoneking v. Bradford Area School District*, 667 F.Supp. 1088, 1102 (W.D. Pa. 1987). Petitioners appealed the district court's decision with respect to qualified immunity to the United States Court of Appeals for the Third Circuit, which affirmed.<sup>2</sup> *Stoneking v. Bradford Area School District*, 856 F.2d 594 (3rd Cir. 1988) ("*Stoneking I*").

Thereafter, Petitioners filed a Petition for Writ of Certiorari in the United States Supreme Court. On March 6, 1989, the Supreme Court vacated the judgment below

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<sup>1</sup> The individual defendants were sued in both their individual and official capacities.

<sup>2</sup> The district court's denial of qualified immunity was immediately appealable under *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817-18, 86 L.Ed.2d 411 (1985).

and remanded the case to the Court of Appeals "for further consideration in light of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. \_\_\_\_ [109 S.Ct. 998] (1989)." *Smith v. Stoneking*, \_\_\_\_ U.S. \_\_\_\_, 109 S.Ct. 1333 (1989). On remand, the Court of Appeals again affirmed the judgment of the district court. *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3d Cir. 1989) ("*Stoneking II*").

#### **b. Statement of Facts**

The record in this action evidences that Petitioners tolerated, facilitated and concealed sexual abuse perpetrated on students by School District teachers for a period of time spanning seven years or more. The following statement of facts summarizes this conduct of Petitioners, the custom or practice created by this conduct and the nexus between this conduct and the repeated sexual assaults suffered by Kathleen Stoneking between 1980 and 1983.

Stoneking's complaint alleged that the School District, acting through Petitioners, adopted a pernicious practice, custom or policy of reckless indifference to and active concealment of instances of known or suspected sexual abuse of students by teachers; that this practice, custom or policy created a climate which facilitated and encouraged sexual abuse of students by teachers in general; and that this practice, custom or policy specifically resulted in repeated sexual assaults upon Stoneking by the Bradford Area High School band director, Edward

Wright, between 1980 and 1983. The gravamen of Stoneking's complaint was that the School District and Petitioners thereby violated her constitutionally protected interest in bodily security and freedom from physical abuse. Complaint ¶¶13-16, App. pp. 40-41.

Stoneking's complaint also alleged that Petitioners had actual knowledge, during the period she was molested, that Wright and other teachers had sexually abused female students, but concealed this information and discouraged students from pursuing complaints against Wright and other teachers. Complaint ¶¶11-19, App. pp. 39-41.

The evidentiary record before the district court revealed that several incidents of sexual abuse of students by teachers, including Wright, occurred both before and after Wright's initial assault of Stoneking. The record also revealed that Petitioners, when apprised by students of specific assaults by Wright and others, reprimanded, humiliated and intimidated the victims, but took no action to control the teachers. See *Stoneking*, 667 F.Supp. at 1101, App. pp. 107-110. Petitioners thereby sanctioned these assaults and tacitly encouraged continued sexual abuse of students by teachers. Stoneking submits that a strong affirmative link exists between the Petitioners' own conduct and the sexual misconduct of Wright and other teachers.

The evidentiary basis for these contentions was addressed in some detail by the district court below. The district court summarized a portion of the evidence with respect to the School District's policy, practice or custom as follows:

The first incident that purports to support the inference that the defendants [Petitioners] had a practice or custom, occurred in late 1977 or early 1978.

According to the deposition testimony of Theresa Rodgers, she was sexually accosted by her social studies teacher, Richard DeMarte, in her senior year. Ms. Rodgers testified that she immediately reported this incident to Mr. Miller and Dr. Smith, whereupon she was warned that it was going to be her word against Mr. DeMarte's and that *she should not go home and tell her parents about the assault*. Ms. Rodgers further testified that the principal suggested that she stay away from Mr. DeMarte, if at all possible, and then counselled her that he would take care of it. Deposition of Theresa Rodgers at 113-14.

Despite Dr. Smith's assurance that "he would take care of it," Theresa Rodgers was never informed of any action taken against Mr. DeMarte. Mr. DeMarte's personnel file maintained by the School District conspicuously lacks any record of disciplinary action taken against him during the pertinent time. In fact, Dr. Smith gave Mr. DeMarte a perfect score on his teaching evaluation, remarkably, an evaluation that included assessment of "emotional stability," "social adjustment," "judgment" and "habits of conduct." See Plaintiff's Exhibit 4, filed in Companion Case.

Additionally, female students voiced complaints against DeMarte in January, 1981; March, 1981; November, 1982; and October, 1985. Dr. Smith and Mr. Miller had direct notice of all these complaints. Mr. Shuey was informed of at least two of the above noted complaints. See Defendants' Second Supplemental Brief Submitted in Companion Case at 4. The personnel file of Mr. DeMarte is silent as to these incidents.

Furthermore, it is not clear what, if any, disciplinary action was taken against the teacher. Significantly, Mr. DeMarte is still coaching the girls' tennis team.

*Stoneking*, 667 F.Supp. at 1100, App. pp. 104-105 (emphasis supplied, footnotes omitted).

The next critical series of events demonstrating the practice or custom of Petitioners and the School District with respect to sexual abuse of students by teachers was addressed in detail by both the district court and the Court of Appeals in *Stoneking II*. This series of events involved Wright's sexual assault of Judy Grove Sowers.<sup>3</sup> Wright sexually assaulted Sowers on June 16, 1979. Reviewing Ms. Sowers' deposition testimony, the Court of Appeals in *Stoneking II* recounted Petitioners' response to Wright's assault on her as follows:

According to the deposition testimony of Judith Grove Sowers, she was sexually assaulted by Wright in 1979 and reported the incident to Miller and Smith. She claims that Smith told her "it was my [Sowers'] fault. That's why he wanted to clear up the rumors because he wanted the band to get back on their feet again . . . . He had told me that if the rumors were true . . . I could find myself in front of a jury, in front of a judge, telling exactly what happened, that being that I had been drinking [and that I was] at his house voluntarily . . . I wouldn't look

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<sup>3</sup> This series of events is also summarized in the district court's opinion in that related case. *Sowers v. Bradford Area School District*, 694 F.Supp. 125 (W.D. Pa. 1988), *aff'd* without opinion, 869 F.2d 591 (3d Cir. 1989), vacated sub nom. *Smith v. Sowers*, No. 88-1350, \_\_\_ U.S. \_\_\_, 109 S.Ct. 1634 (1989), *aff'd* on remand, \_\_\_ F.2d \_\_\_ (3d Cir. 1989).

very good is what he said." *Id.* at 1101 n.24 (quoting deposition). Miller brought Wright to the office, asked Sowers to repeat her allegation in front of him, and asked Wright if it was true, which Wright denied. Supp.App. at 7 (Sowers deposition).

According to the deposition testimony of Sowers' father, who requested a conference with Miller and Sowers about the incident, the defendants attempted to persuade him that no teacher would behave as his daughter alleged. 667 F.Supp. at 1101 (citing deposition testimony). Both Sowers and her father testified that she was presented with the option of recanting her story in front of the band or withdrawing from all band activities. *Id.* Sowers stated that the band was assembled and she was called before it for this purpose, but fled from the room in tears. *Id.*

*Stoneking II*, 882 F.2d at 727, App. pp. 18-19. See also *Stoneking*, 667 F.Supp. at 1101, App. pp. 104-105. Both the Court of Appeals and the district court noted that "it could be inferred that 'the "forced apology" served as a trump card in the hands of Edward Wright,' who could threaten his other victims with similar treatment if they reported his actions . . . ." *Stoneking II*, 882 F.2d at 728, App. p. 19 (quoting *Stoneking*, 667 F.Supp. at 1101-1102). *Stoneking* in fact testified that she did not report Wright's assaults because "I knew about Judy Grove and what happened." *Stoneking II*, 882 F.2d at 728, App. p. 19.

In *Stoneking II*, the court also considered three other incidents of abuse, and Petitioners' response to each. These incidents took place in 1981-1982 and involved sexual harassment by Richard DeMarte, the social studies teacher. The court singled out the following incidents

because Petitioner Smith recorded each, among others, in his own private handwritten notes. *Id.*

In 1981, Lori Tsepelis complained to Petitioners Miller and Smith that DeMarte had kissed her on the back of the neck several times while she was taking a make-up test. *Stoneking II*, 882 F.2d at 728, App. pp. 17-19. Ms. Tsepelis' parents also complained. *Id.* DeMarte admitted one kiss, explaining "that he had kissed her on the cheek as a thank you for having brought food to him at the radio station on two occasions in November." *Id.* Smith conceded that when a teacher kisses a student it is generally a sexual advance, but Smith and Miller merely arranged that Ms. Tsepelis would, for the remainder of the semester, pick up her homework from DeMarte via Miller and that she would not be scheduled for DeMarte's class in the future. Although Smith told DeMarte "he had not used good judgment in having [Ms. Tsepelis] alone in the room," he placed no disciplinary report in DeMarte's file. *Id.*

Two months later, two female students reported to Miller that another student, Lorie Lamberson, was crying in the restroom and when she emerged she told Smith and Miller that she had gone to DeMarte's room with a friend to get a make-up assignment, that he sent her friend away, blindfolded her to demonstrate the sense of touch, and after doing so was down on his hands and knees looking up her dress. The student was so distraught that she was sent to the nurse's office and then told to contact her parents. *Id.* When she spoke to her mother, she stated " 'that she had a problem like Lori Tsepelis.' " *Id.* Although Smith testified that he subjectively believed Ms. Tsepelis' story, his own notes state

that " 'before sending [Ms. Lamberson] home I brought up the fact that she and her mother were aware of the incident with Mr. DeMarte and Lori Tsepelis prior to today and hoped that she wasn't involved in *framing* Mr. DeMarte.' " *Id.* (emphasis added). DeMarte admitted the incident except for the complaint that he had looked up Ms. Lamberson's dress. Nonetheless, Smith's notes continue, " 'I also pointed out that it was her word against [DeMarte's] and that Mr. ~~Miller~~ and I would have to judge from that.' " *Id.* Again, the only action taken was to arrange that the student be scheduled for a different class, and no reprimand or other note was placed in DeMarte's file. *Id.*

The next year, another parent called to complain about DeMarte's relationship with a student because DeMarte had asked the student to sit on his lap at a Halloween party on a social occasion, and again no written warning was placed in DeMarte's file. *Id.*

Based on this record, the Court of Appeals concluded that the available evidence could support the following facts and inferences:

that between 1978 and 1982 Smith and Miller received at least five complaints about sexual assaults of female students by teachers and staff members; that Shuey was told about some of these complaints; that Smith recorded these and other allegations in a secret file at home rather than in the teachers' personnel files, which a jury could view as active concealment; that the defendants gave such teachers excellent performance evaluations, which a jury could view as communication by the defendants to the teachers that the conduct of which they were

accused would not be considered to reflect negatively on them; and that Smith and Miller discouraged and/or intimidated students and parents from pursuing complaints, on one occasion by forcing a student to publicly recant her allegation.

*Stoneking II*, 882 F.2d at 729, App. pp. 20-21.

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## ARGUMENT

### a. Summary of Argument

In *Stoneking II*, the Court of Appeals found it unnecessary to determine whether Petitioners had a duty to protect Respondent from sexual abuse by Edward Wright because the complaint and record supported an alternative ground for denying Petitioners' motion for summary judgment based on qualified immunity. The Court of Appeals held that a reasonable jury could conclude from the evidence adduced in the district court that Petitioners adopted and maintained practices, customs or policies that facilitated sexual abuse of students by teachers in general, and that a causal link existed between Petitioners' own actions and the repeated sexual assaults against Respondent by Wright.

This theory of liability is independent and distinct from the principles confirmed by this Court in *DeShaney* and from the "special relationship" analysis utilized by the Court of Appeals in *Stoneking I*. The Court of Appeals determined that this alternative theory of liability was clearly established and recognized in the decisions of this Court, its own decisions, and the decisions of various other federal courts of appeals prior to the period of time

during which Petitioners committed the acts complained of in Respondent's complaint. Even Judge Stapleton agreed in his dissenting opinion that Respondent "allege[d] an alternative and distinct theory of liability that is not rejected in *DeShaney*."<sup>4</sup> 882 F.2d at 731.

The Court of Appeals also noted that the situation of school children, compelled by state law to attend school, "may not be dissimilar" to other custodial circumstances that give rise to a governmental duty of protection. 882 F.2d at 723-24 (emphasis supplied). Petitioners contend that this statement constitutes a "*sub silentio* holding" reaffirming that "they had a duty to protect school students from harm." Petition for Writ of Certiorari at p. 11. However, the Court of Appeals specifically declined "to

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<sup>4</sup> In his dissent, Judge Stapleton disagreed with the majority regarding whether the record contained sufficient evidence to defeat Petitioners' motion for summary judgment with respect to this alternative theory of liability. In their petition, Petitioners assert that the "Court of Appeals went on to, in effect, decide a motion for summary judgment on the merits [of the alternative theory of liability] that Smith and Miller were never permitted to argue." Petition for Writ of Certiorari at p. 13, n.2. This assertion is simply untrue. On remand to the Court of Appeals, the issue of Petitioners' facilitation and tacit encouragement of abuse was thoroughly briefed by counsel for both parties. In addition to the excerpts from the voluminous record in this case that Petitioners had previously filed with the Court of Appeals, on remand, Petitioners submitted an additional "Supplemental Appendix" in direct response to the alternative theory of liability argued by Respondent in her brief. Petitioners' statement that "the Court of Appeals majority issued its ruling *sua sponte*" is contradicted by Petitioners' own submissions to the Court of Appeals.

rest [its] decision again on an affirmative duty to protect . . . students in this situation . . . " 882 F.2d at 724. Thus, the "duty to protect" or "special relationship" theory of liability, which prompted this Court's remand of the case for further consideration in light of *DeShaney*, no longer provides the basis for the holding of the Court of Appeals. Any reference in *Stoneking II* to this theory of liability is pure dicta and does not warrant review by the United States Supreme Court.

The remainder of Petitioners' arguments are factual contentions, which similarly do not justify consideration by this Court. The Court of Appeal correctly concluded that the record in this case can support all of the factual findings necessary to sustain personal liability against Petitioners Smith and Miller for the constitutional deprivations sustained by Respondent.

**b. The statements made by the Court of Appeals in dicta do not merit review by the Supreme Court.**

The Court of Appeals did not base its decision upon a "duty to protect" theory of liability. Petitioners concede this, but nevertheless argue that "[t]he failure of the Court of Appeals to expressly rule on the *DeShaney* issue has the practical effect of denying Smith, Miller and Shuey's claim of qualified immunity with respect to the 'duty to protect' theory of liability." Petition for Writ of Certiorari at p. 12. They further contend that "the trial court *may* choose to charge the jury that Smith, Miller and Shuey had a duty under the Fourteenth Amendment to protect Stoneking from the harm that allegedly befell her . . . " *Id.*

Petitioners' statement regarding the "practical effect" of *Stoneking II* is plainly incorrect given the holding of the Court of Appeals with respect to Shuey:

[W]e must conclude, in light of our precedent, that Stoneking's claims against Shuey amount to mere "inaction and insensitivity" on his part. See [*Commonwealth v.*] *Porter*, 659 F.2d [306,] 337 [(3d Cir. 1981) (in banc), cert. denied, 458 U.S. 1121, 102 S.Ct. 3509, 73 L.Ed.2d 1383 (1982)]. We cannot discern from the record any affirmative acts by Shuey on which Stoneking can base a claim of toleration, condonation or encouragement of sexual harassment by teachers which occurred in one of the various schools within his district.

\* \* \*

[W]e will vacate the district court's order denying the motion for qualified immunity as to Shuey in his individual capacity, and remand with directions that his motion be granted.

*Stoneking II*, 882 F.2d at 731.

Petitioners' argument is also premature. They are complaining about a possible action that the district court "may" take with respect to an issue that the Court of Appeals found unnecessary to address. The Supreme Court has acknowledged on various occasions that it normally will not review issues not passed on by the Court of Appeals. *City of Canton, Ohio v. Harris*, 489 U.S. \_\_\_, 109 S.Ct. 1197, 1203, n.5 (1989); *Bowen v. American Hospital Association*, 476 U.S. 610, 625, n.11 (1986) (per Justice Stevens) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842 (1984)). The logic underlying this policy becomes even more compelling where the judgment of the Court of Appeals rests

upon a well-established theory of liability such as that relied upon by the Court of Appeals in this case.

- c. **The theory of liability upon which the Court of Appeals based its judgment in *Stoneking II* is unaffected by this Court's decision in *DeShaney v. Winnebago County Department Of Social Services*.**

*DeShaney* arose out of a State's failure to intervene and protect a small boy, Joshua DeShaney, who had been beaten and permanently injured by his father, with whom he had lived. Joshua DeShaney's guardian ad litem commenced an action in federal court pursuant to 42 U.S.C. Section 1983 against certain social workers and other local officials who had received complaints that Joshua was being abused by his father, but who nonetheless had not acted to remove the boy from his father's custody. The plaintiff claimed that the defendants' failure to act had deprived Joshua DeShaney of his liberty in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Court rejected this argument, holding that "a state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." 109 S.Ct. at 1004.

As the Court of Appeals noted, the "principal distinction" between *DeShaney* and this case is the status of the abuser and the abuser's relationship to the government body. *Stoneking II*, 882 F.2d at 724. In *DeShaney*, "the State [had] played no part in creating" the danger to Joshua DeShaney. 109 S.Ct. at 1006. No link existed between the defendants and the abuse of Joshua. Joshua had suffered his tragic fate at the hands of his father, "who was in no

sense a state actor." *Id.* (footnote omitted). However, in the instant case, the abuser was a state actor whose assaults upon Respondent were facilitated by the conduct of his superiors and his status as director of the Bradford Area High School band.

The second critical distinction between *DeShaney* and the instant case is the nature of the conduct of the individual defendants in each case. In *DeShaney*, the defendants were guilty only of passive inaction in the face of private violence. In contrast, the record supports that Petitioners actively concealed complaints of abuse perpetrated by their subordinates upon students and actively intimidated students who did attempt to complain. See *Stoneking II*, 882 F.2d at 724-25. As the Court of Appeals observed, "[n]othing in *DeShaney* suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates." *Id.* at 725.

- d. **Petitioners' contention that the holding of the Court of Appeals creates a "new theory of personal liability for school officials" is incorrect and does to merit Supreme Court review.**

Petitioners argue that the Court of Appeals created "a new theory of personal liability for school officials in their individual capacities." Petition for Writ of Certiorari at pp. 11, 24. This contention is inconsistent with this Court's analysis in *Kentucky v. Graham*, 473 U.S. 159 (1985). In *Graham*, the Court explained that a "personal-capacity suit," in contrast to an "official-capacity suit," "seeks to impose personal liability upon a government official for actions he takes under color of state law." 473

U.S. at 165 (emphasis added, citations omitted). The theory of personal liability urged by Respondent and adopted by the Court of Appeals in *Stoneking II* is predicated upon the acts of Petitioners that facilitated, condoned and encouraged abuse of students by teachers under Petitioners' supervisory authority. As the Court of Appeals noted, Petitioners "were incontestably acting under color of state law" with respect to the supervisory conduct at issue. *Stoneking II*, 882 F.2d at 724.

"On the merits, to establish *personal* liability in a §1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Graham*, 473 U.S. at 166 (emphasis in original, citations omitted). Respondent urged, and the Court of Appeals agreed, that the record is sufficient to support a finding that the acts of Petitioners caused the deprivation of Respondent's constitutionally protected rights. *Stoneking II*, 882 F.2d at 731. Although Petitioners disagree with this finding, such factual disputes do not warrant review by the Supreme Court.

Once it is established that the record supports a *prima facie* cause of action against government officials in their personal or individual capacities, the officials may attempt to raise various defenses, including qualified immunity, which Petitioners have raised in the instant case. *Graham*, 473 U.S. at 166-67. Under the defense of qualified immunity, government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "The contours of the right must be sufficiently

clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635 (1987). Consistent with this principle, the United States Court of Appeals for the Third Circuit requires "some but not precise correspondence" with applicable precedents, and demands that "officials apply well-developed legal principles." *People of Three Mile Island v. Nuclear Regulatory Comm.*, 747 F.2d 139, 144 (3d Cir. 1984).

In *Stoneking II*, the Court of Appeals correctly concluded that both the constitutionally protected rights of Respondent and the corresponding duties of Petitioners were clearly established prior to and during the period of time Petitioners committed the acts complained of in Respondent's complaint. The liberty interest in freedom from state intrusions into bodily security is as old as the Constitution itself. *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980). The applicability of this interest to public school children has been recognized at least since 1977, when this Court held in *Ingraham v. Wright*, that "corporal punishment in the public schools implicates a constitutionally protected liberty interest." 430 U.S. 651, 672 (1977). As the Court of Appeals observed, the individual right to be free from more egregious intrusions upon personal security, such as sexual molestation, predates this Court's decision in *Ingraham*:

Since a teacher's sexual molestation of a student could not possibly be deemed an acceptable practice, as some view teacher-inflicted corporal punishment, a student's right to be free from such molestation may be viewed as clearly established even before *Ingraham*.

*Stoneking II*, 882 F.2d at 727 (citing *Rochin v. California*, 342 U.S. 165 (1952) (substantive due process violation occurs where conduct "shocks the conscious"))).

Similarly, in 1976, this Court recognized that government officials charges with supervisory authority could be held liable under Section 1983 where an "affirmative link" exists between the supervisors' own actions and the misconduct of their subordinates. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976). The Court of Appeals found that this basis for liability was well-established at the time Respondent was assaulted by Wright. Specifically, the Court of Appeals held that "by at least 1981 . . . it was clearly established law that [supervisory] officials may not with impunity maintain a custom, practice or usage that communicated condonation or authorization of assaultive behavior." 882 F.2d at 730. The Court of Appeals based this conclusion upon multiple federal cases, including this Court's decision in *Rizzo v. Goode* and two of its own cases decided in 1981. *Stoneking II*, 882 F.2d at 729-730 (citing *Commonwealth v. Porter*, 659 F.2d 306, 309 (3d Cir. 1981) (en banc), cert. denied, 458 U.S. 1121 (1982); *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981), cert. denied, 455 U.S. 1008 (1982)). The Court of Appeals noted that its "holdings [in *Porter* and *Black*] were consistent with those reached earlier by other federal courts of appeals. *Id.* at 730 (citing *McClelland v. Facticeau*, 610 F.2d 693, 697-98 (10th Cir. 1979) (police chiefs may be held liable for failure to correct misconduct of which they have notice); *Sims v. Adams*, 537 F.2d 829, 832 (5th Cir. 1976) (complaint stated cause of action against mayor and chief of police for failure to control police officer's propensity for violence); *Turpin v. Mailet*, 579 F.2d 152, 167-68 (2d Cir.

1978) (en banc) (city could be liable under the Fourteenth Amendment for encouraging animosity among police officers against plaintiff which led them to believe that they could violate his civil rights with impunity), *vacated in light of Monell*, 439 U.S. 974 (1978), *reinstated*, 591 F.2d 426 (2d Cir. 1979) (per curiam) (case reinstated on same theory but under §1983 in light of *Monell*); judgment for plaintiff reversed, *Turpin v. Mailet*, 619 F.2d 196, 202 (2d Cir.) (plaintiff failed to prove official policy where "there was no evidence of a prior pattern or practice of harassment"), *cert. denied*, 449 U.S. 1016 (1980)).

Petitioners argue that the court's holding in *Stoneking II* represents an expansion of the theory of liability reconfirmed by this Court in *City of Canton v. Harris*, 489 U.S. \_\_\_, 109 S.Ct. 1197 (1989). Although the Court of Appeals noted that its analysis was consistent with *City of Canton*, its denial of qualified immunity to Petitioners was based exclusively on the state of the law as it existed when Respondent was being abused by Wright. The Court of Appeals merely recognized that Respondent's theory of liability against the School District and Petitioners in their official capacities will not be determined according to the law as it existed in 1981, but as it exists today, including the principles reconfirmed in *City of Canton*. See also *Bordanaro v. McLeod*, 871 F.2d 1151 (1st.Cir.) (liability against police chief and mayor for unauthorized actions of police officers forcing entry into bar and beating patrons based on the police officials' constructive knowledge of custom and deficient policies in recruitment and training), *cert. denied sub nom.*, *Everett v. Bordanaro*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 75 (1989).

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# CONCLUSION

WHEREFORE, Respondent prays that this Honorable Court deny the Petition for Writ of Certiorari.

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